Supreme Court, U.S.
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No. 93-831

# In the Supreme Court of the United States

OCTOBER TERM, 1993

MARY ANN CARTER RENNIE AND RICHARD L. DARST,
PETITIONERS

*v.*

JOHN H. DALTON, SECRETARY OF THE NAVY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

## QUESTION PRESENTED

1. Whether the court of appeals erred in affirming the district court's finding that petitioner Rennie did not establish that respondent had created a hostile work environment due to sexual harassment or that respondent had retaliated against her, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 2000e-16.

2. Whether the court of appeals abused its discretion or failed to provide adequate prior notice when it imposed sanctions on petitioner Darst under Federal Rule of Appellate Procedure 38 and Seventh Circuit Rule 38, based on its finding that he had filed a frivolous appeal on behalf of his client petitioner Rennie.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 3 F.3d 1100. The opinion of the district court (Pet. App. A24-A49) is unreported.

### JURISDICTION

The judgment of the court of appeals on the merits of the case was entered on August 27, 1993. The order of the court of appeals imposing sanctions was entered on October 14, 1993. Pet. App. A21-A22. A petition for rehearing regarding sanctions was treated as a motion to reconsider sanctions and was denied on December 20, 1993. The petition for a writ of certiorari was filed on November 24, 1993. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner Mary Ann Carter Rennie (Rennie) filed suit against respondent Secretary of the Navy, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, 2000e-16. After a four-day bench trial, the district court ruled that the Navy had not discriminated against Rennie on the basis of sex and had not retaliated against her for claiming sexual harassment. Pet. App. A24-A49. The court of appeals affirmed. Pet. App. A1-A20. The court of appeals also sanctioned Rennie's counsel, petitioner Richard L. Darst (Darst), under Federal Rule of Appellate Procedure 38 and Seventh Circuit Rule 38, for filing a frivolous appeal. Pet. App. A18-A19, A21-A22.

1. In March, 1982, petitioner Rennie was hired for a temporary position at the Naval Avionics Center (NAC) in Indianapolis, Indiana. Pet. App. A24-A25. NAC was a civilian facility involved in the manufacture of electronic components for the United States Navy, and was operated by the Navy. Pet. App. A24. Rennie's continued employment was contingent upon her successful completion of a soldering course offered by NAC. Pet. App. A25.

Rennie's soldering course lasted approximately one week and consisted of four students, two men and two women, and was taught by a male instructor. Pet. App. A25. On the first day of the course, the instructor told an off-color joke involving a sexual reference. *Ibid.* The other female student rebuked the instructor for the joke and the instructor later apologized to

the class. *Ibid.* On another occasion, the instructor participated in a discussion among the students regarding a local strip bar. *Ibid.*

NAC administered both a written and a practical examination at the end of the course. Typically, the instructor graded both examinations and the Quality Audits department reviewed the examinations and independently assigned its own grade. Pet. App. A27. In Rennie's case, the instructor gave her a passing grade on her written examination, but did not grade her practical examination because he felt she had exhibited an animosity toward him. *Ibid.* The Quality Audits department graded the practical examinations without knowing the identity of the students and Rennie was given a failing grade. *Ibid.*

Because she failed the examination, Rennie was required to repeat the soldering course and the practical examination. Pet. App. A28. There were two students in Rennie's second class, Rennie and a male student who also had failed his first course. *Ibid.* The same instructor taught the course, which again lasted about one week. Pet. App. A28-A30.

During the second course, Rennie told the instructor that she was contemplating filing a complaint with the equal employment opportunity (EEO) office regarding his harassment of her. Pet. App. A28-A29. The instructor's supervisor subsequently met with Rennie and Rennie indicated that her problem had been taken care of and that "everything was okay." Pet. App. A29. The supervisor told the instructor to keep his distance from Rennie and to separate himself from her so as not to exacerbate the situation. Pet. App. A29. Rennie orally complained to the EEO office at NAC that she was being sexually harassed by the

instructor based primarily on her belief that he was staring at her. Pet. App. A29. The course instructor addressed the complaint by placing a blackboard between himself and Rennie during the second practical exam, which took place the following day. Pet. App. A29. Although he sat behind the blackboard, the instructor remained available to answer questions during the examination. *Ibid.* The instructor gave Rennie a failing grade on her practical examination. Pet. App. A30. The Quality Audits department again reviewed the practical examination without knowing the identity of the students and it graded Rennie's examination lower than the instructor had. Pet. App. A30. Because petitioner Rennie failed the soldering course, the Navy terminated her employment. Pet. App. A30.

2. Petitioner Rennie filed an EEO complaint. An EEOC complaints examiner issued a proposed ruling and found that the instructor had engaged in sexual harassment based on the one off-color joke. Pet. App. A34. The examiner did not believe, however, that Rennie had been discharged in retaliation for her complaints of Title VII violations. *Ibid.* The Secretary of the Navy declined to follow the report and concluded that the single joke did not result in a hostile work environment or sexual harassment. *Ibid.* The EEOC affirmed the Navy's decision. *Ibid.* Rennie then filed the instant suit alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2, 2000e3, 2000e-16.[1]

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[1] Petitioner filed a second suit alleging retaliation based on NAC's refusal to rehire her. Pet. App. A8. The district court

3. The district court conducted a four-day bench trial and received post-trial briefing and oral submissions from counsel. Pet. App. A24. The court entered judgment for respondent on the ground that Rennie failed to demonstrate hostile work environment sexual harassment, quid pro quo sexual harassment, retaliation, disparate treatment sex discrimination, disparate impact sex discrimination, or discrimination by the EEO office. Pet. App. A34-A49.

With regard to the hostile work environment claim, the district court found that no student, other than Rennie, recalled hearing the instructor make any off-color remarks other than the one joke and the strip bar discussion. Pet. App. A26, A37. No student recalled observing the instructor stare at Rennie, or touch or rub against her in any offensive manner as Rennie claimed. *Id.* at A26, A37. The court specifically found that the classroom was so small that the other students would have heard or seen such behavior if it had occurred. *Id.* at A26, A37, A39. The district court found that all the case presented were two isolated incidents of inappropriate off-color remarks. Pet. App. A36-A37. The court concluded that "[w]hile the instructor showed a lack of judgment in telling an off-color joke, the Court finds it did not create a hostile environment in that a reasonable woman would not have allowed the telling of one off-color joke to interfere with her work performance." Pet. App. A37.

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dismissed both complaints for failure to exhaust administrative remedies, but the court of appeals reversed. On remand, the parties agreed to treat the second complaint as an amendment of the first complaint. *Ibid.*

As for the retaliation claim, the district court found that Rennie had failed to state a prima facie case under the standard of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Pet. App. A39-A41. It concluded that she had not suffered an adverse action by her employer, specifically finding that the placement of the blackboard between her and the instructor did not qualify as adverse treatment because the instructor continued to answer questions and work with students as needed and it was Rennie's decision not to seek his assistance. Pet. App. A40. The court also found that Rennie did not establish retaliatory discharge because nothing in the record indicated that NAC's articulated reason for firing petitioner, *i.e.*, her failure of the examination, was pretextual. Pet. App. A42-A43.

4. The court of appeals affirmed. Pet. App. A1-A20. The court cited the five-part test set forth in *Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989), cert. denied, 493 U.S. 1036 (1990). Pet. App. A11. It found that Rennie had established three elements including that "the harassment was based on sex." Pet. App. A11. The court found, however, that Rennie had failed to establish that she was subject to sexual advances or requests for sexual favors and failed to establish that the alleged sexual harassment "had the effect of unreasonably interfering with [her] work performance in creating an intimidating, hostile, or offensive working environment that affected seriously [her] psychological well-being." Pet. App. A12. The court reasoned that the alleged conduct did not interfere with Rennie's work performance because the record did not reveal "demeaning conduct and sexual

stereotyping [resulting in] anxiety and debilitation to the plaintiff [such] that working conditions were 'poisoned' within the meaning of Title VII." Pet. App. A12, quoting *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989), and *Scott* v. *Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986). The court also found that petitioner failed to demonstrate that the instructor's conduct would have adversely affected the work performance of a reasonable person. Pet. App. A12. The court affirmed the district court's conclusion that petitioner lacked the skills to meet the NAC soldering standards. *Id.* at A13.

The court of appeals expressly noted that this Court had granted the petition for certiorari in *Harris* v. *Forklift Systems, Inc.*, cert. granted, 113 S. Ct. 1382 (1993), in which a district court had dismissed a plaintiff's sexual harassment claim because the alleged conduct did not "seriously affect [her] psychological well-being." Pet. App. A12 n.5. The court of appeals explained that while its opinion "mentioned this element ([e]ffect on psychological well-being), [the Court's] holding does not depend on it for not only did Rennie fail to present any evidence that the alleged conduct had a serious [e]ffect on her psychological well-being, but she also failed to establish that she 'was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature.'" *Ibid.*, quoting *Swanson*, 882 F.2d at 1238. The court of appeals concluded that "the isolated incidents fall short of the requisite level of hostility or pervasiveness needed to establish a hostile work environment violation under Title VII." Pet. App. A13. The court of appeals rejected the

argument that the district court failed to consider all the evidence in ruling on the sexual harassment claim, noting that the district court discussed both the joke and the conversation relating to the strip bar in a paragraph of its conclusions of law. Pet. App. A13.

The court of appeals also affirmed the district court's finding that the placement of the blackboard during Rennie's second practical exam was without retaliatory motive. Pet. App. A15. The court specifically found that Rennie failed to establish a prima facie case under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), because the placement of the blackboard "did not rise to the level of adverse treatment because the instructor still made himself available to answer questions and the placement of the blackboard was an attempt to respond to [Rennie's] concern that [the instructor] was staring." Pet. App. A15.

At the close of its opinion, the court of appeals found that the appeal was frivolous "as all [it] did was restate and reargue facts and credibility issues previously ruled upon in the district court." Pet. App. A18-A19. The court explained that it was of the opinion that sanctions were appropriate under Rule 38 of the Federal Rules of Appellate Procedure. Pet. App. A19. The court directed Rennie's counsel, petitioner Darst, "who should have known the appropriate legal standards," to pay respondent's costs and reasonable attorneys' fees stemming from the appeal. *Ibid.* Noting that under Seventh Circuit Rule 38, it had to provide counsel with notice that it was contemplating sanctions and give him an opportunity to respond, the court ordered that petitioner Darst

submit his response to sanctions within 15 days and that respondent submit an accounting of fees and costs. *Ibid.* After considering Darst's response, the court of appeals issued an order holding that sanctions were appropriate and imposed sanctions against Darst in the amount of $7,370, plus costs in the amount of $520.62. Pet. App. A22. Petitioner Darst sought reconsideration of the sanctions order which was denied.

## ARGUMENT

1. a. Petitioner Rennie contends (Pet. 10-12) that the district court did not evaluate her hostile work environment claim based on the totality of the circumstances. She argues that in its conclusion of law rejecting that claim, the district court considered only the fact of the one off-color joke.

Rennie correctly points out that under *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986), and *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), the totality of the circumstances must be taken into account by a court evaluating a sexual harassment claim. Rennie's argument, however, takes the district court's conclusion of law out of context. She focuses on paragraph 13 (Pet. 10) in which the district court mentioned only the one joke. The court, however, devoted nine paragraphs to analysis of Rennie's hostile work environment claim. Pet. App. A36-A37. The court took into account a number of factors, specifically mentioning the strip bar discussion. Pet. App. A37. The court found that Rennie failed to support her claim with other incidents due in part to the conflicting testimony of other witnesses. *Ibid.* The court of appeals also conducted a totality of the

circumstances analysis of Rennie's hostile work environment claim (Pet. App. A9-A13), and recognized that its review on that legal issue was de novo. Pet. App. A9.

b. Rennie also claims that, despite the court of appeals' statement "that its holding does not depend on the psychological well-being requirement, it actually does." Pet. 15. Rennie therefore contends that the case should be remanded to the district court for reconsideration under *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), which rejected that standard. Pet. 18-19. Rennie also points out that the Sixth and Seventh Circuit case authority cited by the court of appeals was subsequently overruled by *Harris*. Pet. 12-19.

Rennie correctly points out that the circuit case law cited by the court of appeals has been overruled by *Harris*, to the extent it required a plaintiff to establish psychological harm in order to prevail on a sexual harassment claim. The Seventh Circuit itself has expressly recognized the impact of *Harris* on its earlier precedents. In *Saxton* v. *American Telephone & Telegraph Co.*, No. 92-1545 (7th Cir. Dec. 3, 1993), slip op. 14, the court explained that "to the extent our prior cases required proof that the harassment 'cause[d] such anxiety and debilitation to the plaintiff that working conditions were poisoned,' *Scott* v. *Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986), they have been overruled." The court noted "[t]o the same effect as *Scott*, see *Daniels* v. *Essex Group, Inc.*, 937 F.2d 1264, 1271 (7th Cir. 1991); *Swanson* v. *Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1238 (7th Cir. 1989), cert. denied, 493 U.S.

1036 (1990); *Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 418-419 (7th Cir. 1989)." *Id.* at 14 n.12.

Petitioner Rennie is not correct, however, in her claim that the court of appeals' ruling depends on the psychological well-being requirement such that a remand is necessary. The court of appeals anticipated this Court's ruling in *Harris*, and specified that its holding depended on the fact that Rennie "also failed to establish that she 'was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors *or other verbal or physical conduct of a sexual nature* . . . .'" Pet. App. A12 n.5 (emphasis added), quoting *Swanson*, 882 F.2d at 1238. The requirement that a sexual harassment claim of hostile work environment be rooted in conduct of a sexual nature is inherent in the nature of the claim and *Harris* did not undermine that factor. In Rennie's case, the court of appeals merely reaffirmed the district court's conclusions that the only conduct of a sexual nature was one off-color joke and one discussion concerning a strip bar and that these "isolated incidents fall short of the requisite level of hostility or pervasiveness needed to establish a hostile work environment violation under Title VII." Pet. App. A13. In short, the court of appeals provided sufficient analysis of Rennie's claim to preclude the need for a remand. Unlike *Harris* which the district court found to be a "close case," *Harris*, 114 S. Ct. at 371, the courts below made clear that Rennie's case is not close.

c. Petitioner Rennie also challenges the rejection of her retaliation claim, contending that the placement of the blackboard between Rennie and the course instructor during the second practical exam

constituted adverse treatment. Pet. 19-21. She argues that "retaliatory harassment" is illegal unless it is so trivial that an ordinary person would not be deterred from speaking out. Pet. 21.

The courts below did not reject the claim because the conduct was too trivial, but rather because it was not adverse. The court of appeals explained that "[w]hile we recognize that the placement of the blackboard might be classified as different treatment, albeit a slight difference, we hold that it did not rise to the level of adverse treatment because the instructor still made himself available to answer questions and the placement of the blackboard was an attempt to respond to [Rennie's] concern that [the instructor] was staring." Pet. App. A15. The court of appeals emphasized that this determination relied in large part on the credibility determination of the district court in regard to testimony by Rennie, the instructor, and the other student in the classroom at the time. This credibility assessment does not warrant further review by this Court.

2. a. In regard to the sanctions imposed sua sponte by the court of appeals, petitioner Darst argues (Pet. 22-27) that the court of appeals' initial statement in its August 27, 1993, opinion about sanctions indicated the court had already decided to impose them. Darst contends that he therefore was not afforded adequate notice and that an insurmountable burden was imposed on him.

The requirement that a person be given reasonable notice and an opportunity to respond prior to sanctions being imposed is set forth in Seventh Circuit

Rule 38.[2] Federal Rule of Appellate Procedure 38 does not include an express prior notice requirement.[3]

Although the court of appeals indicated in its initial August 27, 1993, opinion that it was "of the opinion" that Rule 38 sanctions were appropriate and directed that counsel pay costs and fees, the court there also explicitly recognized that it had to provide "reasonable notice to counsel that *we are contemplating sanctions* and give an opportunity to respond," which it then gave. Pet. App. A19 (emphasis added). The court afforded Darst 15 days in which to respond and Darst submitted a 29-page brief in response. Pet. App. A19. In its October 14, 1993, order, the court repeated that in its August opinion it had "stated that Plaintiff-Appellant's appeal was frivolous and that the court was contemplating sanctions" under Rule 38. Pet. App. A21. It concluded in its October order that sanctions were appropriate after having considered Darst's response. Pet. App. A21. After imposition of sanctions, Darst submitted a

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[2] Seventh Circuit Rule 38 provides:

> The court may, on its own or on motion of a party, impose sanctions on a party or an attorney as otherwise authorized by law. Before imposing sanctions the court will give reasonable notice to the person or persons that it is contemplating sanctioning and give those persons an opportunity to respond.

[3] Federal Rule of Appellate Procedure 38 provides, in its entirety:

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

15-page petition for rehearing which was treated as a motion for reconsideration and denied.

Thus, the court of appeals treated its initial opinion as constituting the notice required by Seventh Circuit Rule 38 that it was contemplating sanctions and it subsequently imposed sanctions after considering Darst's response. The court's interpretation of its own initial opinion as satisfying the circuit's formal notice requirement does not warrant review by this Court.

b. Darst also seeks review by this Court of the sanctions based on his contention that he "did not commit the act alleged in the opinion." Pet. 27-29.

The court of appeals has discretion under Federal Rule of Appellate Procedure 38 to award sanctions in the case of a frivolous appeal "as a matter of justice to the appellee and as a penalty against the appellant." *Burlington Northern R.R.* v. *Woods*, 480 U.S. 1, 4 (1987), quoting Advisory Committee Notes on Fed. R. App. P. 38, 28 U.S.C. App. at 492. This fact-based determination by the court of appeals does not merit review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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